clearly aimed at resolving all war claims against Japan," the court held that "[t]here is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions nearly half a century later." *Id.* at 67a. Rather, petitioners' claims were matters to be addressed solely "at the government-to-government level." *Id.* at 68a.

D.C. Circuit Decisions. Petitioners appealed that judgment. The D.C. Circuit first affirmed the dismissal of the complaint on the single ground (which the District Court had not reached) that the FSIA's commercial activity exception did not apply retroactively to claims against Japan involving wartime events that occurred before 1952. Pet. App. 18a. This Court vacated that decision on the retroactivity of the FSIA, and remanded the case to the D.C. Circuit for further consideration in light of *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004). *See* Pet. App. 17a.

While this Court in *Altmann* held that the FSIA applies retroactively to conduct before 1952, it also made clear that "nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases," noting that such an opinion by the State Department "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 541 U.S. at 702 (citations and footnote omitted). The concurring opinion of Justices Breyer and Souter further emphasized that a statement of interest filed by the United States could "refer, not only to sovereign immunity, but also to other grounds for dismissal, such as * * * the nonjusticiable nature * * * of the matters at issue." *Id.* at 714 (Breyer, J., concurring). That opinion referenced the District Court's decision in *this very case* as one in which the claims asserted arguably "raise political questions that were settled by international agreements." *Id.* (citing *Hwang Geum Joo* v. *Japan*, 172 F. Supp. 2d 52, 58, 64-67 (D.D.C. 2001)) (additional citations omitted).

In both the District Court and on appeal, the United States government, through the Departments of State and Justice, took the position that Japan was entitled to sovereign immunity and that petitioners' claims were non-justiciable because the Treaty of Peace embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of World War II are to be resolved through inter-governmental negotiations not private lawsuits.[4] Moreover, the Executive also informed the courts that the relief sought by petitioners "would have serious repercussions for our foreign policy toward Japan and other nations" and "also could have serious implications for stability in the region." U.S. Dist. Ct. Statement of Interest at 1, 35. For example, the United States noted that North Koreans are among the putative class of victims in this case and that permitting North Koreans to sue Japan in the United States for wartime conduct "could pose a significant risk of seriously disrupting international relations in East Asia at a time when such relations are already extremely sensitive." U.S. Supp. Ct. App. Br. 8. Specifically, the United States explained that "[t]he availability of a U.S. forum to litigate wartime claims could reasonably be expected to impair discussions between Japan and North Korea regarding normalization of relations, talks that have grown to encompass North Korea's nuclear weapons program." *Id.* at 9.

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[4] *See, e.g.*, U.S. Supp. Ct. App. Br. 2 ("the Executive, with the advice and consent of the Senate, has made a foreign policy determination that all World War II-related claims against Japan should be resolved exclusively through intergovernmental agreements. That determination is reflected in the 1951 Treaty of Peace * * *.") (filed Nov. 23, 2004); U.S. Dist. Ct. Statement of Interest 3 ("In order to decide the claims here, the Court would have to question the policy judgment and wisdom of the President, Congress and our Allies in entering the 1951 Treaty with Japan") (filed Apr. 27, 2001).

On remand, the D.C. Circuit (per Chief Judge Ginsburg and Judges Sentelle and Tatel) again unanimously affirmed the dismissal of the complaint, agreeing with the District Court that the complaint presents nonjusticiable political questions. Pet. App. 15a. In reaching this conclusion, the Court of Appeals considered "'the particular question posed,' * * * namely, whether the series of treaties Japan concluded in order to secure the peace after World War II foreclosed the [petitioners'] claims." Pet. App. 8a (quoting *Baker*, 368 U.S. at 211). The court noted that the Treaty of Peace expressly waives, in Article 14, "all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Id.* (internal quotations and citation omitted).

The D.C. Circuit went on to hold that the political question doctrine barred the claims of the petitioners from China, Taiwan, and South Korea, which were not formal parties to the Treaty but nevertheless encompassed within its reach. The Court of Appeals found it "pellucidly clear the Allied Powers intended that *all* war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits." Pet. App. 9a-10a (emphasis added). That Article 26 of the Treaty of Peace obligated Japan to enter into bilateral treaties with non-Allied states on the same or similar terms as the Treaty, "indicates the Allied Powers expected Japan to resolve other states' claims, like their own, through government-to-government agreement." *Id.* at 10a. Noting petitioners' own concession that it seems "anomalous" to bar war claims of *U.S.* nationals but nevertheless permit such claims of *foreign* nationals, the court remarked that "'anomalous' is an understatement." *Id.* at 9a.

The D.C. Circuit declined petitioners' invitation to decide whether bilateral treaties and other agreements entered into between Japan and China, Taiwan, and South Korea, respectively, preserved their individual claims. *Id.* at 12a-13a. The

court noted that "the question whether the war-related claims of foreign nationals were extinguished when the government of their countries entered into peace treaties with Japan is one that concerns the United States only with respect to her foreign relations" and that the foreign relations power is "demonstrably committed by our Constitution not to the courts but to the political branches." *Id.* at 13a (citing *American Ins. Assn.* v. *Garamendi*, 539 U.S. 396, 423 n.12 (2003)).

In looking at the particular question of the management of relations with Japan for conduct during World War II, the court explained that "it has been the foreign policy of the United States to effect as complete and lasting a peace with Japan as possible by closing the door on the litigation of war-related claims, and instead effecting resolution of those claims through political means." Pet. App. 13a (quotation omitted). The Court of Appeals found that to interpret the treaties between Japan on the one hand, and China, Taiwan, or South Korea on the other hand would not only "undo" settled foreign policy of state-to-state negotiation with Japan but could also "disrupt Japan's 'delicate' relations with China and Korea." *Id.* at 14a-15a (quotation omitted). In so holding, the D.C. Circuit also accorded deference to "the judgment of the Executive Branch of the United States Government, which represents, in a thorough and persuasive Statement of Interest, that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States." *Id.* at 6a.

In reaching its decision in this case, the D.C. Circuit took account of these and other foreign policy concerns as stated by the Executive. That well-reasoned decision faithfully applied the proper legal standards, conflicts with no other decisions, and is plainly correct.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS A CORRECT APPLICATION OF SETTLED LEGAL STANDARDS AS TO WHICH THERE IS NO CONFLICT AMONG THE CIRCUITS.

The decision below faithfully applies this Court's precedents on the political question doctrine and deference to the Executive on foreign policy issues, and does not conflict with decisions from the other courts of appeals. What petitioners contend are conflicting decisions from the lower courts merely reflect each court's "analysis of the particular question posed" by each case. *Baker*, 369 U.S. at 211. The cited cases involved different factual and foreign policy contexts, different treaties or no treaties at all, and different positions by the Executive or no positions at all. In fact, all of the courts to have considered similar issues—claims relating to Japan's wartime conduct during World War II—have reached entirely consistent conclusions that such claims are not subject to adjudication in light of the Treaty of Peace and the foreign policy it embodies.

A. There Is No Conflict Regarding Application Of The Political Question Doctrine To Specific Facts.

In an attempt to create a conflict where none exists, petitioners mischaracterize the D.C. Circuit's opinion below, asserting that the D.C. Circuit held that "claims related to conduct during a war" are "constitutionally committed to the Executive Branch *as a categorical matter*." Pet. 8 (emphasis added). The D.C. Circuit made no such categorical holding. Instead, it considered "'the *particular question*' posed in this case * * * namely, whether the series of treaties Japan concluded in order to secure the peace after World War II foreclosed the [petitioners'] claims." Pet. App. 8a (quoting *Baker*, 369 U.S. at 211 (emphasis added). In reaching its conclusion that petitioners' claims are foreclosed by the

political question doctrine, the D.C. Circuit carefully considered the Treaty of Peace, the foreign policy it embodies, and the expressed views of the Executive regarding the foreign policy implications of this case.[5]

The opinion below is entirely consistent with cases considering application of the political question doctrine to claims involving other countries, growing out of other factual circumstances. The D.C. Circuit's decision in this case simply says nothing about the justiciability of claims for alleged misconduct in Germany or Italy during World War II, which are governed by different agreements and foreign policies, *see Ungaro-Benages* v. *Dresdner Bank, AG*, 379 F.3d 1227 (11th Cir. 2004); *Alperin* v. *Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), or about the justiciability of claims against the Palestine Liberation Organization for terrorist acts committed in Israel, *see Ungar* v. *Palestine Liberation Org.*, 402 F.3d 274 (1st Cir.), or about conduct during the war in Bosnia, *see Kadic* v. *Karadizic*, 70 F.3d 232 (2d Cir. 1995). The conflict petitioners assert simply reflects the consideration by the courts of differing circumstances.

In *Ungaro-Benages*, the Eleventh Circuit concluded that claims against two German banks seeking return of property allegedly illegally confiscated through the German state program of "Aryanization" during World War II, were not barred by the political question doctrine. 379 F.3d at 1230. That conclusion, based on a careful review of the "Foundation Agreement" entered into between the United States and Germany in 2000 to govern claims arising from

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[5] The District Court had expressly *declined* to reach the issue whether "war reparations are always justiciable," instead "conclud[ing] *based on the specific circumstances of this case* that plaintiffs' claims are nonjusticiable * * *." Pet. App. 62a n.9 (emphasis added). The D.C. Circuit left that ruling intact, likewise basing its conclusions on the specific circumstances of this case.

conduct in Germany during World War II, says nothing about petitioners' claims here against Japan. The Foundation Agreement requires only that the United States government file a Statement of Interest in any case seeking World War II reparations concerning conduct in Germany that states that "it is in the foreign policy interests of the United States for the case to be dismissed on any valid legal ground but [that does] not suggest that the agreement itself provides an independent legal basis for dismissal." *Id.* at 1232. Considering just such a Statement of Interest, the Eleventh Circuit held that the plaintiffs' claims were not barred by the political question doctrine, because the United States had specifically agreed that such World War II reparations claims against Germany could proceed in United States courts and that the Foundation Agreement would not, by itself, provide a basis for dismissal of such claims. *Id.* at 1253-54.[6]

Likewise, the Ninth Circuit's decision in *Alperin* is completely consistent with the D.C. Circuit's decision below. *Alperin* involved claims against defendants for their alleged activities in support of the Ustasha regime that carried out atrocities in Croatia during World War II. 410 F.3d at 539-540. In *Alperin*, however, there was no treaty embodying a U.S. foreign policy that claims are to be resolved through government-to-government negotiations, and there was no statement of interest or amicus brief by the United States. *Id.*

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[6] The Eleventh Circuit went on to uphold the district court's dismissal of the complaint on the basis of international comity, finding that the strength of the interests of both the United States and Germany in using the forum established by the Foundation Agreement to resolve such claims, and the adequacy of that alternative forum, required the court to abstain from exercising jurisdiction. 379 F.3d at 1238-39. In reaching this conclusion, the Eleventh Circuit noted that "the executive's statement of national interest in issues affecting our foreign relations are entitled to deference." *Id.* at 1239 n.14 (citing *Altmann*, 541 U.S. at 701-702).

at 538, 549-550. Moreover, the court distinguished between two separate kinds of claims raised against the defendants there. Performing a claim-specific analysis, the Ninth Circuit concluded that the political question doctrine *barred* "War Objectives Claims" raising various war-related torts tied to the alleged assistance provided by the defendants to the Ustasha. *Id.* at 548. These alleged human rights violations were akin to the claims asserted by petitioners here. *Id.* at 543.

Petitioners argue that *Alperin* conflicts with the decision below by focusing on the "Property Claims" for return of property, which the Ninth Circuit found did not pose a non-justiciable political question. *Id.* at 548. But the Ninth Circuit distinguished the War Operations Claims from the Property Claims because the former involve the powers of the Executive branch to wage war and conduct foreign affairs, where there is only "a narrowly circumscribed role for the judiciary." *Id.* at 559 (internal quotation and citation omitted). The court held that deciding the War Operations Claims would require the judiciary to make a foreign policy determination about the wartime actions of a foreign government with which the United States was at war—something for which the judiciary has no manageable standards and that is committed to the political branches. *See id.* at 561 ("Condemning—for its wartime actions—a foreign government with which the United States was at war would require us to review[] an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been constitutional[ly] commit[ted].") (citations and quotations omitted). In contrast, the Ninth Circuit found that "the Property Claims consist of garden-variety legal and equitable claims for the recovery of property." *Id.* at 548. Even aside from the fact that the two cases involve very different circumstances, there is no conflict between the decision below and *Alperin* because *both* courts found that

similar kinds of claims—for human rights abuses during wartime—were barred by the political question doctrine.[7]

Ungar v. *Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005), and *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), are simply additional examples of courts making case-specific determinations concerning the claims before them. That the First and Second Circuits found that the political question doctrine did not bar adjudication of, respectively, claims against the PLO for terrorist actions in Israel, or against the self-proclaimed president of the unrecognized Bosnian-Serb entity for conduct during the war in Bosnia, poses no conflict with the decision below. Those cases did not involve the Treaty of Peace with Japan, nor did the Executive express the view that adjudication would interfere with foreign policy. To the contrary, in *Kadic* the Executive expressly "disclaimed" that the political question doctrine would bar the claims. 70 F.3d at 250. In neither of these cases did the court hold broadly that claims for conduct "related to highly politicized foreign wars" could never run afoul of the political question doctrine. Pet. 11. To the contrary, each court carefully considered the *Baker* v. *Carr* factors and determined that the particular claims before them did not

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[7] Part of the *Alperin* case is the subject of pending certiorari petitions. But those petitions do not challenge the Ninth Circuit's ruling as to the War Operations claims, only the ruling as to the Property Claims. Because the *Alperin* respondents did not file a cross-petition challenging the former ruling, any such challenge has been waived. *See* S. Ct. R. 12.5, 13.4. Accordingly, any ruling in *Alperin*, either affirming or reversing as to the Property Claims, would have no conceivable relevance to this case, which involves not only a unique treaty embodying a specific foreign policy as informed by the views of the Executive, but also claims akin to the War Operations Claims that are not subject to further review in *Alperin*.

pose nonjusticiable political questions. *See Ungar*, 402 F.3d at 279-280; *Kadic*, 70 F.3d at 249-250.

In fact, every state and federal courts that have actually examined war claims relating to the Treaty of Peace have reached the same conclusion as the D.C. Circuit: that adjudication of such claims is barred. The court in *Taiheiyo Cement Corp.* v. *Superior Court*, 12 Cal. Rptr. 3d 32, 35, 41-42 (Ct. App. 2004)—expressly relying on the D.C. Circuit's determination that the Treaty of Peace "embodies the federal government's foreign policy that claims against Japan and its nationals are to be resolved diplomatically"—held that the Treaty barred adjudication of World War II-related claims of a Korean national against a Japanese company.[8] Similarly, in *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 716 (9th Cir.), the Ninth Circuit held that state-law claims of Korean and Chinese nationals against Japanese companies were barred because the state statute creating the cause of action "implicate[d] the exclusive power of the federal government to make and resolve war, including the resolution of claims arising out of such actions."[9] *See also Mitsubishi Materials*,

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[8] Although *Taiheiyo* involved the related doctrine of federal foreign affairs preemption, its conclusion is completely consistent with the D.C. Circuit's ruling that the settled foreign policy embodied in the Treaty likewise bars adjudication of alleged uncodified international law claims that seek similar war reparations. *See Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 731 (2004) (Congress may "shut the door to the law of nations * * * at any time (explicitly, *or implicitly by treaties or statutes that occupy the field*) * * *.") (emphasis added).

[9] The court also noted that the legal question whether federal law preempts a *German* plaintiff's World War II-related claim was justiciable because not "every dispute" over the application of a treaty is non-justiciable. *Id.* at 713 n.11. In this case, the D.C. Circuit did not hold that "every dispute" that touches on a treaty raises a political question; it merely held that this particular case is nonjusticiable in light of the specific policy embodied in the Treaty of

6 Cal. Rptr. 3d at 178 (Treaty of Peace bars claims of American POWs against Japanese companies).

The D.C. Circuit's decision is not only consistent with other cases involving the Treaty, it is plainly correct. The Treaty embodies a clear foreign policy of the United States under which all Japanese reparations issues would be addressed through government-to-government negotiations, in order to ensure the peace and stability of the entire Asian-Pacific region. The D.C. Circuit properly declined to second-guess those policy determinations, which implicate not only the foreign policy of the United States but that of other sovereign nations. The prospect of a U.S. court being required to interpret bilateral agreements entered into between Japan and its Asian neighbors—which implicate, among other issues, sensitive foreign policy concerns involving Japan and the two different governments that have claimed to represent China over the years—amply demonstrates the non-justiciable political nature of the case.

In any event, given that this case turns on a specific foreign policy arising from a unique treaty—and that it has already been more than 50 years since the conclusion of the 1951 Treaty of Peace—the precise issue resolved by the D.C. Circuit is unlikely to recur with any frequency, if at all. Thus, whatever else can be said about the D.C. Circuit's well-reasoned decision, there is no need for this Court to expend its limited resources to resolve this unique policy dispute.

Peace. The Ninth Circuit did not hold to the contrary. In fact, the court's holding that the Treaty preempted similar claims brought against companies under state law, *id.* at 714-715, is entirely consistent with D.C. Circuit's holding in this case. *See supra* n.8.

B. There Is No Conflict Regarding The Deference Owed The Executive On Treaty Interpretation And Foreign Policy.

There is likewise no conflict between the decision below and decisions from other circuits concerning the deference due to the views of the Executive Branch. Once again, the outcomes in the cases petitioners cite are explained by the differing circumstances of the cases and the particular interest stated by the Executive in each case.

The very premise of petitioners' argument is flawed. The D.C. Circuit did not, as petitioners suggest, accord "complete deference" to the views of the Executive in this case without engaging in an independent analysis of justiciability. Pet. 12. After noting the "thorough and persuasive Statement of Interest" filed by the United States, Pet. App. 6a, the D.C. Circuit conducted its *own* analysis, concluding that "it is pellucidly clear the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort actions." *Id.* at 9a. The Court of Appeals thus followed this Court's guidance in *Powell* v. *McCormack*, 395 U.S. 486 (1969), and made its own assessment as to the justiciability of the case. *Cf.* Pet. 13 n.4. The court also cited this Court's decision in *Altmann*, which noted "that a Statement of Interest concerning 'the implications of exercising jurisdiction over [a] particular [foreign government] in connection with [its] alleged conduct * * * might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.'" Pet. App. 7a-8a (quoting *Altmann*, 541 U.S. at 702).

Because the decision below is distinguishable from the decisions cited by petitioners, any purported conflict is illusory. The Statement of Interest at issue in *Ungaro-Benages* was based on the Foundation Agreement with Germany, not the Treaty of Peace with Japan, and

accordingly asserted a different interest than that asserted by the United States below. The statement, as required by the Foundation Agreement, merely informed the court "that it is in the foreign policy interests of the United States for the case to be dismissed on any valid legal ground but [did] not suggest that the agreement itself provides an independent legal basis for dismissal." 379 F.3d at 1232. The views expressed by the Executive on appeal were similarly non-committal. *See* U.S. Amicus Br. filed in *Ungaro-Benages*, 2003 WL 23857369, at *15-16 ("[T]he United States does not take a position with respect to the merits of the parties' particular legal arguments"). And in *Kadic* v. *Karadzic*, the United States "expressly *disclaimed* any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits." 70 F.3d at 250 (emphasis added). Even in the absence of such a statement, the Second Circuit in *Kadic* noted that "an assertion of the political question doctrine by the Executive Branch" would be "entitled to respectful consideration." *Id.*

Likewise here, the D.C. Circuit properly applied a "policy of case-specific deference to the political branches." Pet. App. 7a (quoting *Sosa*, 542 U.S. at 733 n.21). The foreign policy concerns identified by the United States, moreover, were not rendered in a vacuum but rather were tethered directly to the Treaty of Peace. *See supra* at 7. Thus, the D.C. Circuit merely applied the well-settled and venerable principle that "'[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.'" Pet. App. 28a (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)).

In any event, for the reasons set forth above and in the opinions below, the D.C. Circuit's decision was plainly correct even without regard to the Executive's views. Thus, certiorari is unwarranted not only because there is no conflict

among the lower courts, but also because the outcome of the case would be no different under whatever degree of deference is accorded the Executive's view.

C. There Is No Conflict Concerning Interpretation Of Foreign Treaties.

Petitioners also contend that the D.C. Circuit's decision not to accept petitioners' invitation to determine their rights under bilateral agreements between Japan and China, Taiwan, and South Korea, respectively, conflicts with decisions of this Court and of other of the courts of appeals regarding interpretation of foreign treaties. Pet. 14-17. Not so. None of the cases cited by petitioners involved an asserted conflict with U.S. foreign policy—much less a policy to leave specific matters for resolution by government-to-government negotiations—and none of them conflicts with the measured and case-specific determination by the D.C. Circuit below. Indeed, the lack of any conflict is not all surprising, since petitioners never once cited any of these decisions involving foreign treaties during the nearly five years this case was pending in the lower courts.

Once again, petitioners' argument is based on a mischaracterization of the decision below. The D.C. Circuit did not hold that it would *never* interpret a treaty between two foreign sovereigns. Instead, it held that interpreting these specific agreements would involve political questions in this particular case, where: (1) the policy established by the Treaty of Peace is that all claims against Japan for its conduct during World War II were to be addressed by government-to-government negotiations, not private lawsuits; and (2) the Executive had explained the foreign relations problems that would ensue should the court venture to resolve conflicting interpretations of the foreign agreements in this particular ca

Petitioners cite *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 53 (1829), which arose in a wholly different context. Yet to the

extent the case has any relevance at all, it actually supports the D.C. Circuit's decision in this case. *Foster* involved a boundary dispute that turned in part on an interpretation of a foreign treaty. Yet Congress, through legislation, had endorsed a particular interpretation of that treaty. *Id.* at 304. Thus, far from simply construing the treaty itself, the Court deferred to Congress's interpretation, noting that "[a] question like this respecting the boundaries of nations is * * * *more a political than a legal question*; and in its discussion, the courts of every country must respect the pronounced will of the legislature." *Id.* at 309 (emphasis supplied).

In *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 584 (1823), this Court mentioned the 1763 Treaty between Spain, Great Britain and France only in passing as it determined what effect to give ownership claims to land based on grants from Indians concerning lands over which European governments had claimed dominion. *See id.* at 571-572 ("The plaintiffs in this cause claim the land * * * under two grants, purported to be made * * * by the chiefs of certain Indian tribes * * * and the question is whether, this title can be recognized in the Courts of the United States."). Nothing in that decision says anything about the application of the political question doctrine to the circumstances of this case.[10]

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[10] *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221 (1986), is similarly off-point. That case merely held that not every dispute over interpretation of a *U.S.* treaty raises a political question because "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. The D.C. Circuit did not shirk from its responsibilities to interpret U.S. treaties. Far from it, the court correctly construed the Treaty of Peace as embodying a clear foreign policy "that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits." Pet. App. 9a-10a.

The court of appeals' decisions cited by petitioners likewise pose no conflict. In *Prewitt Enterprises, Inc.* v. *OPEC*, 353 F.3d 916, 923-924 (11th Cir. 2003), no treaty was involved. Instead, the Eleventh Circuit turned to Austrian law, which incorporated an agreement between OPEC (which is not a sovereign state) and Austria (where OPEC is headquartered) concerning service of process against OPEC. In *Sea Hunt, Inc.* v. *The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), the Fourth Circuit looked to a 1763 Treaty between Great Britain and Spain to determine whether a U.S. plaintiff could claim the wrecks of two Spanish warships, but both of those nations had agreed as to the interpretation of that treaty as applied to the question raised in the case. The court found that agreement between sovereigns to be "significant." *Id.* at 646. The D.C. Circuit below was faced with no such agreement by the sovereigns as to the interpretation of the foreign treaties involved here. Nor is *Ungar*, *supra*, to the contrary. The court in *Ungar* specifically noted that because there was no Statement of Interest filed by the United States, the court's decision—and interpretation of agreements between Israel and the Palestinian Authority "did not signify a lack of respect for, or conflict with, the wishes of the political branches." 402 F.3d at 281. This case presents precisely that kind of conflict.

Thus, petitioners' newly-cited cases have no bearing on this case. The foreign policy embodied in the Treaty of Peace was to leave the resolution of war claims against Japan to *government-to-government* negotiations, not private lawsuits. Whatever the content of Japan's bilateral treaties and agreements, the D.C. Circuit correctly refrained from accepting petitioners' invitation to arbitrate those sensitive foreign policy issues. It was and is the clear foreign policy of the United States to leave the resolution of such issues to the countries involved, not the U.S. judiciary.

II. THE DECISION BELOW IS FAITHFUL TO THIS COURT'S PRECEDENTS CONCERNING THE SEPARATION OF POWERS.

Perhaps recognizing that there is no conflict between the D.C. Circuit's opinion below and decisions from other of the courts of appeals, petitioners argue that certiorari should be granted due to the "fundamental separation of powers issues" raised by this case. Pet. 18. Petitioners' argument on this point is yet again based on a broad overreading of the decision below. The D.C. Circuit's limited, case-specific decision below is completely consistent with this Court's precedents. In fact, the separation of powers doctrine would have been contravened by a contrary ruling, which would have entangled the courts in sensitive foreign policy issues that the political branches have directed be resolved through diplomatic means.[11]

As explained above, the D.C. Circuit addressed the specific question before it, and did not hold that all "claims related to conduct during a war are the exclusive province of the Executive Branch," or give "virtually blanket deference" to the views of the Executive. Pet. 18. The D.C. Circuit did not hold that it is *never* appropriate to interpret treaties—whether U.S. or foreign—in a case involving foreign policy. Rather, it held that *in this case*, given the particular treaty involved and the particular views of the Executive, the claims posed a

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[11] Petitioners complain, Pet. 18 n.6, that the D.C. Circuit decided justiciability before the question of subject matter jurisdiction. But as the D.C. Circuit explained, petitioners "point to no authority suggesting [that] a dismissal under the political question doctrine is an adjudication on the merits" and "[t]hat is not how the Supreme Court sees the matter." Pet. App. 4a. *See Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (law "does not dictate a sequencing of jurisdictional issues"); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (justiciability implicates Article III jurisdiction).

nonjusticiable political question. Nothing in the decision below suggests that the D.C. Circuit, if presented with different claims dealing with the conduct of a different sovereign, governed by different treaty provisions, could not reach a different result.

Rather than conflicting with the decision below, the cases petitioners cite support a case-by-case determination of the application of the political question doctrine, even to cases involving the interpretation of treaties. Each of those cases—which concern treaties entered into by the United States—note, in the same passages cited by petitioners, the role of the political branches when "political" issues arise in the interpretation of treaties.[12] Thus, the full sentence from *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961)—of which petitioners cite but a fragment (Pet. 21)—reads: "While courts interpret treaties for themselves, *the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight*." (emphasis added). That is precisely how the D.C. Circuit considered the particular question posed in this case; it interpreted the Treaty of Peace for itself, giving "great weight" to the views of the political branches.

It is petitioners who seek a blanket pronouncement that the political question doctrine does not apply to cases arising under the FSIA or the ATS. Pet. 19. Such an argument,

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[12] *See Jones* v. *Meehan*, 175 U.S. 1, 32 (1899) ("the construction of treaties is the peculiar province of the judiciary * * * *except in cases purely political*") (emphasis added); *Sullivan* v. *Kidd*, 254 U.S. 433, 442 (1921) ("the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight") (citations omitted); *Wilson* v. *Wall*, 73 U.S. (6 Wall.) 83, 89 ("The construction of [treaties] is the peculiar province of the judiciary, *when a case shall arise between individuals*.") (emphasis added).

however, is completely refuted by this Court's decisions. In *Altmann*, this Court explained that its holding concerning the retroactive application of the FSIA did not negate the deference that was due to Statements of Interest filed by the Executive Branch concerning "particular question[s] of foreign policy." 541 U.S. at 702. And, as the D.C. Circuit noted below, in *Sosa*, *supra*, this Court explained that "[a] policy of 'case-specific deference to the political branches' may be appropriate in cases brought under the Alien Tort Statute." Pet. App. 7a (quoting *Sosa*, 542 U.S. at 733 n.21).[13]

Moreover, and in any event, petitioners' argument presupposes that this case was properly brought under the FSIA and the ATS. In fact, it was not. The District Court squarely held that Japan was entitled to FSIA immunity. *See* Pet. App. 47a-61a. And Japan has contended, in accord with this Court's clear precedents, that the ATS cannot apply to this case against a foreign sovereign. *See Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (ATS does not apply in action against foreign state because "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country"); *Sosa*, 542 U.S. at 724 (ATS "is a jurisdictional statute creating no new causes of action"); *see also* Pet. App. 33a-34a (D.C. Circuit holding that ATS does not apply to this case). Thus, although the D.C. Circuit did not reach these issues on remand, this Court would have to do so in order to opine on petitioners' incorrect assertion that the FSIA and ATS some-

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[13] The cases cited by petitioners (*see* Pet. 20) do not hold that the political question doctrine cannot apply in cases brought under the FSIA or the ATS. As noted above, in *Ungar*, *Kadic*, *Alperin* and *Ungaro-Benages*, each court examined the particular case before it in reaching a conclusion as to whether the claims asserted were nonjusticiable political questions. In none of these cases did the court hold, as petitioners argue, that the political question doctrine cannot apply to cases brought under these statutes.

how trump the political question doctrine. Given the overwhelming likelihood that the Court would find that neither statute supports petitioners' case, this case does not present a proper vehicle for examining any hypothetical interplay between those statutes and the political question doctrine.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-543

IN THE

Supreme Court of the United States

HWANG GEUM JOO, YUAN ZHULIN, LOLA TOMASA SALINOG, LIU HUANG A-TAU, KIM BOON-SUN, KIM SANG HEE, KIM SOON-DUK, YI YONG NYO, KIM BOK-DONG, LU XIUZHEN, GUO YAYING, ZHU QIAOMEI, PRESCILA BARTONICO, NARCISA CLAVERIA, MAXIMA REGALA DE LA CRUZ, on behalf of themselves and all others similarly situated,

Petitioners,

v.

GOVERNMENT OF JAPAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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INTRODUCTION

Japan dispels neither the existence of conflicts among the Courts of Appeals nor the importance of the issues those conflicts represent. Japan has merely pointed to highly specific factual differences that both ignore and misconstrue the relevant factual and legal differences between the cases. Under Japan's analysis, no circuit split could exist except between cases with identical fact patterns. Indeed, by claiming the differences in outcomes among the circuits merely reflect the "particularized approach" required under the political question doctrine, Japan would make any review of the legal principles involved impossible. The relevant bases for decision-making show, however, that a split exists among the circuits on the application of the political question doctrine to cases involving war-related claims.

ARGUMENT

I. A Circuit Split Exists on the Proper Standards for Applying the Political Question Doctrine to Claims for War-Related Conduct.

A. Japan's Attempt to Explain Conflicting Circuit Court Cases As Mere Factual Differences Fails.

The legal question raised by these cases is whether claims related to war-time conduct are non-justiciable. The D.C. Circuit concluded that "our Constitution does not vest authority to resolve [the] dispute in the courts" whether the series of treaties entered into by Japan after World War II "preserved" or "extinguished" Petitioners' claims against Japan. App. 6a. The court made the sweeping legal observation that war-time claims are the province of the Executive Branch, and that therefore such claims are barred under the political question doctrine even if they are not expressly extinguished by post-war treaties. App. 11a-12a (citing *Ware v. Hylton*, 3 U.S. 199, 230 (1796)). Thus

whether the 1951 Treaty between Japan and the U.S. and other Allied Powers ("San Francisco Treaty") and agreements by Japan with other Asian countries ***actually*** extinguished Petitioners' claims did not matter to the court. Indeed, the court pointedly refused to determine whether Petitioners' claims were settled or extinguished by the applicable treaties – declining to interpret the treaties to which Petitioners' home countries were actually parties – and instead deferred to Executive power as a categorical matter. App. 14a-15a.

The differences between the categorical approach taken by the D.C. Circuit and other Circuits' approaches to similar cases are not merely factual as Japan contends, but concern the central question of whether such claims are generally justiciable at all. First, Japan's argument that there is no circuit split because other circuits were not interpreting the San Francisco Treaty is frivolous, because any case could be distinguished as "not conflicting" if examined at this level of specificity. Opposition to Petition for Certiorari ("Opp. Cert.") at 10. Here the content of the post-war treaty at issue is even less relevant to whether there is a conflict, in light of the D.C. Circuit's focus on the bare existence of the San Francisco treaty, rather than the terms of the treaties. Indeed, Japan does not explain how the treaties at issue in the other cases differ from the San Francisco Treaty in ways that produce different outcomes. In fact, the other treaties confirm a conflict with the D.C. Circuit. For example, in *Ungaro-Benages v. Dresdner Bank AG*, the U.S. agreement with Germany at issue, the Foundation Agreement, specifically redressed plaintiff's claims. 379 F.3d 1227, 1233, 1234 (11th Cir. 2004). The Foundation Agreement thus presented a ***stronger*** basis for holding that executive action had displaced the courts compared to the San Francisco Treaty, which does not redress Petitioners' claims and to which most Petitioners' home countries are not even parties.

In fact, in a case decided on November 23, 2005, *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005), the Second Circuit held that claims against Austria for Nazi-era property deprivations were nonjusticiable in light of the Foundation Agreement, the precise argument rejected in *Ungaro-Benages*. *Id.* at 71. The court noted that its decision conflicted with the Eleventh Circuit case. *Id.* at 71 n.16. *Whiteman* thus adds to the circuit split on the political question issues presented here.

Japan's other attempts to distinguish *Ungaro-Benages* on its facts also fail. Japan claims *Ungaro-Benages* is distinguishable because the Executive Branch did not take the position there that the treaty at issue required dismissal of the case. Opp. Cert. at 12. However, this disregards the more pertinent fact that the Executive in that case submitted a Statement of Interest opposing adjudication and urging dismissal, 379 F.3d at 1231-32, just as the Executive Branch did here, yet the Eleventh Circuit nevertheless declined to defer to the Statement of Interest on political question grounds. *Id.* at 1236. The fact that the Eleventh Circuit declined to apply the political question doctrine in spite of the Foundation Agreement's redressing the plaintiff's claims, and the Executive Statement of Interest urging dismissal, puts *Ungaro-Benages* in square conflict with the D.C. Circuit's decision.

Japan also attempts to explain the differences in the results of the cases according to whether the Executive Branch filed a Statement of Interest opposing adjudication. *E.g.*, Opp. Cert. at 12. But that attempt simply does not explain differences among the circuits on whether war-related claims are categorically committed to the Executive Branch. Indeed in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), *petition for cert. filed sub nom. Order of Friars Minor v. Alperin*, 74 U.S.L.W. 3146 (U.S. Sept. 7, 2005) (No. 05-326), the Ninth Circuit rejected the same two

factors – (1) a U.S. policy favoring government-to-government resolution of war-related claim; and (2) foreign relations problems flowing from U.S. courts' adjudicating such claims. *Id.* at 568. The court also expressly rejected the type of categorical reasoning employed by the D.C. Circuit. *See id.* at 547 ("The dissent would have the political question doctrine remove from our courts 'All matters that fall by their constitutional DNA into this sphere [of conduct involving foreign relations]. This over-inclusive approach threatens to sweep all cases touching foreign relations beyond the purview of the courts" (citation omitted)).[1] The court did

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[1] Japan also claims *Alperin* is consistent with the D.C. Circuit's decision because the human rights claims dismissed in *Alperin* were similar to Petitioners' claims. Opp. Cert. at 13. However, the Ninth Circuit indicated its holding "does not signify that slave labor claims automatically raise issues that are committed to the political branches." 410 F.3d at 562 n.20. Further, it dismissed the human rights claims based on reasoning that does not apply here: The claims dismissed in *Alperin* concerned alleged war crimes by the Vatican, which had never been judged by the United States for wartime conduct. *Id.* at 560 (noting Allies chose not to prosecute the Vatican in the Nuremberg Trials). Further, the court noted that the plaintiffs had alleged only indirect involvement and indirect benefit by the Vatican. *Id.* at 560-61. Petitioners do not ask the courts to enter such uncertain territory here: Both Japan's war time conduct and the issue of sex trafficking in women and girls have been condemned by the United States. Trafficking Victims Protection Act, 22 U.S.C.A. § 7101 (2000). Further, as with the property claims held justiciable in *Alperin*, judicially discoverable and manageable standards exist to adjudicate these recognized wrongs. *See Alperin*, 410 F.3d at 553. *See also id.* at 555 (noting the manageability inquiry focuses on "whether the courts are capable of granting relief in a reasoned fashion"); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1996) ("universally recognized norms of international law provide judicially discoverable and manageable standards" for claims for rape, torture, and other torts committed during the Balkan conflict). In any case, the D.C. Circuit did not hold that it lacked standards for adjudicating Petitioners' claims, but rather that, as an overarching matter, the claims were committed to the Executive Branch because of their foreign policy implications.

suggest that it might have decided differently if a treaty covered the *Alperin* plaintiffs' claims, *id.* at 549-50, but the Eleventh Circuit's contrary decision that the Foundation Agreement did ***not*** bar adjudication under the political question doctrine indicates, in fact, that the Ninth and Eleventh Circuits ***differ*** on when a post-war treaty renders claims non-justiciable, a question also presented by this case. *See also id.* at 546-47 (noting wide range of outcomes in courts that have considered the justiciability of World War II-era claims); *Whiteman*, 431 F.3d at 71 n.16 (noting its disagreement with Eleventh Circuit).

Japan's attempt to explain the outcome of the cases as a function of the position of the Executive Branch also fails because Japan misconstrues the cases. Contrary to Japan's contention, the Eleventh Circuit and Second Circuit did ***not*** hold that strong deference to the views of the Executive Branch was appropriate with respect to the justiciability of the war-related claims in those cases. Opp. Cert. at 12-13. The Eleventh Circuit in *Ungaro-Benages* expressly declined to defer to the Executive Statement of Interest urging dismissal of the case in light of the Foundation Agreement. 379 F.3d at 1236 & n.12. Similarly in *Kadic*, the Second Circuit expressly stated that it would ***not*** necessarily have deferred to the Executive Branch even if the Executive Branch had opposed adjudication on political question grounds. 70 F.3d at 250. Thus, the fact that the Executive Branch did not submit a Statement of Interest in *Kadic* hardly renders the case consistent with the D.C. Circuit's reasoning. Moreover, Japan's contention that the Executive Branch's views control and explain the outcome of these cases undercuts its contention that courts have not automatically deferred to the Executive Branch on issues of nonjusticiability in the field of foreign affairs. Indeed, if deference to the Executive Branch explains the outcome of the other circuit court cases, then the D.C. Circuit opinion – which Japan contends does not reflect complete deference to